

*file*

BEFORE THE  
STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS

---

In the Matter of the Application	)	
of Eugene Gruber to Place a Structure	)	Case No. 3-LM-93-396
on the Bed of Green Bay, Oconto County,	)	
Wisconsin	)	

---

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Mr. Eugene Gruber, 1284 Rockwell Road, Green Bay, Wisconsin 54313, completed filing an application with the Department of Natural Resources for a permit to place an off-shore breakwater 90 feet from the ordinary high-water mark of Green Bay, extending 200 feet in a direction parallel to the shoreline in the NE 1/4 of the NE 1/4 of Section 26, Township 29 North, Range 22 East, Town of Little River, Oconto County.

The Department of Natural Resources issued a Public Notice which stated that unless written objection was made within thirty days after publication, the Department might issue a decision on the permit without a hearing. The staff of the Lake Michigan District of the Department of Natural Resources objected to the issuance of the proposed permit.

On February 24, 1995, the Department filed a request for hearing with the Division of Hearings and Appeals. Pursuant to due notice including publication, a hearing was held on March 30, 1995, Jeffrey D. Boldt, Administrative Law Judge, presiding.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to the proceeding are certified as follows:

Eugene J. Gruber  
1284 Rockwell Road  
Green Bay, Wisconsin 54313

Wisconsin Department of Natural Resources, by

Attorney Michael J. Cain  
P. O. Box 7921  
Madison, Wisconsin 53707-7921

### FINDINGS OF FACT

1. Eugene Gruber, 1284 Rockwell Road, Green Bay, Wisconsin 54313, filed a complete application with the Department for a permit under sec. 30.12, Stats., to place stone rip-rap 90 feet waterward of the ordinary high-water mark on the bed of Green Bay, Town of Little River, Oconto County. The Department and the applicant have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats.

2. The applicant owns real property located in the NE 1/4 of the NE 1/4 of Section 26, Township 29 North, Range 22 East, Oconto County. The above-described property abuts Green Bay which is navigable in fact at the project site.

3. The applicant proposes to construct a rip-rap breakwater 90 feet below the ordinary high-water mark (OHWM). The breakwater would be approximately 200 feet long, running across approximately half of the applicant's 400 feet of riparian frontage. The OHWM can be clearly identified by a line of vegetation and other standard water-mark indicators that run approximately 30 feet below the applicant's dwelling on the property. The proposed breakwater would lie approximately 90 feet below this line, in an area which currently has water depths of six inches or more of public waters.

4. The purpose of the proposed project is erosion protection of the applicant's property. The applicant has lost considerable property to erosion over the last couple of years. Much of this can be traced to his own unauthorized destruction of vegetation and dredging in connection with efforts to drain a wetland on his property. The result of these efforts has included the backwash of bay waters deeper into the lakebed area below the OHWM.

5. The proposed structure will not materially obstruct existing navigation on Green Bay, given the shallow water depths in the cove area where the applicant proposes to place rip-rap.

6. The proposed breakwater would be detrimental to the public interest in maintaining coastal wetlands and wetland functional values. The applicant's dredging and grading efforts have disturbed the functioning of wetlands and resulted in an acceleration of erosion near and behind the proposed rip-rap breakwater. The rip-rap barrier would block the flow of water from the coastal wetlands to the bay. Placement of a 200 foot long rip-rap breakwater would further disrupt the water exchange and recharge functions of the wetland and would result further in destruction of aquatic vegetation.

7. There was undisputed expert testimony that the proposed rip-rap breakwater would be detrimental to the public interest in the public waters of Green Bay. The further

destruction of wetland vegetation would have a detrimental impact on water quality and fishery values in the immediate area. Further, sand would likely accumulate on the area of public lake-bed (the area below the OHWM belongs to the public and not the riparian) behind the proposed structure.

The DNR indicated it would likely have no objection to a similar rip-rap wall near or just below the willow tree approximately 30 feet bayward of the applicant's dwelling. This would protect the applicant's property from erosion with no negative impact on either the wetlands or the public waters of Green Bay. It is hoped that a return of disturbed aquatic vegetation will also slow the rate of erosion in the cove area along the shore.

8. The applicant is financially capable of constructing, maintaining, monitoring or removing the structure if it should be found in the public interest to do so.

9. The proposed structure will not reduce the effective flood-flow capacity of Green Bay.

10. The proposed structure would adversely affect water quality and increase water pollution in Green Bay. The structure would cause environmental pollution as defined in sec. 144.01(3), Stats. Destruction of further wetland area would likely result in harm to the water filtration function of the wetlands.

11. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11, Stats., and Ch. NR 150, Wis. Adm. Code, regarding assessment of environmental impact.

#### CONCLUSIONS OF LAW

1. The applicant is a riparian owner within the meaning of sec. 30.12, Stats.

2. The proposed rip-rap breakwater described in the Findings of Fact constitutes a structure within the meaning of sec. 30.12, Stats.

3. The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to deny a permit for the construction and maintenance of said structure.

4. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Adm. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

ORDER

WHEREFORE, IT IS HEREBY ORDERED that the applicant's request for a permit as described in the foregoing Findings of Fact is DENIED,

IT IS FURTHER ORDERED, that the petition for review be DISMISSED, with prejudice.

Dated at Madison, Wisconsin on April 24, 1995.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705  
Telephone: (608) 266-7709  
FAX: (608) 267-2744

By

  
JEFFREY D. BOLDT  
ADMINISTRATIVE LAW JUDGE

## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.